# In the United States Bankruptcy Court
# for the
# Southern District of Georgia
## Brunswick Division



In the matter of: )
)
ALEXANDER SRP APARTMENTS, LLC )
)
*Debtor* )

Chapter 11 Case

Number 12-20272

**MEMORANDUM AND ORDER ON DEBTOR'S MOTION FOR AMENDED OR ADDITIONAL FINDINGS OR, ALTERNATIVELY, MOTION TO ALTER, AMEND OR GRANT RELIEF FROM ORDER AND REIMPOSE AUTOMATIC STAY**

Debtor filed its Chapter 11 Case March 5, 2012. Debtor owns a 232 unit apartment complex in Glynn County, Georgia (the "Property"), financed by Regions Bank in 2008. LSREF2 Baron Trust 2011 ("LSREF2"), is the current holder of the Promissory Note and the Deed to Secure Debt that secures the Note, which as of the filing date had a balance of principal and accrued interest totaling approximately $17.3 million. *See* LSREF2's Statement of the Case, Dckt. No. 103. LSREF2 filed a Motion for Relief from Stay and Motion to Dismiss on March 12, 2012. Dckt. Nos. 42, 43. This Court conducted a consolidated hearing on those motions on April 13, 2012, and entered an order granting LSREF2's Motion for Relief from Stay and denying on an interim basis LSREF2's Motion to Dismiss on April 20, 2012. Dckt. No. 110. At the hearing both parties presented appraisals and testimony from experts. After consideration of the record and the evidence presented at the hearing, this Court found that stay relief was warranted based on Debtor's pre-petition

waiver of the automatic stay and the negligible, if any, equity in Debtor's sole property. LSREF2 Baron, LLC v. Alexander SRP Apartments, LLC (In re Alexander SRP Apartments, LLC), 12-20272, Dckt. No. 110 (April 20, 2012) (Davis, J).

The matter currently before the Court is Debtor's Motion for Amended or Additional Findings or, Alternatively, Motion to Alter, Amend, or Grant Relief from Order and Reimpose Automatic Stay (hereinafter "Motion to Amend"), which was filed April 30, 2012. Dckt. No. 121. LSREF2 filed an Objection to Debtor's Motion to Amend on May 14, 2012. Dckt. No. 122. After due consideration of this motion and LSREF2's objection, I now enter the following Conclusions of Law.

## CONCLUSIONS OF LAW

In its Motion to Amend, Debtor seeks to present additional evidence as to the value of the Property and for the Court to reconsider its April 20, 2012 Order pursuant to Bankruptcy Rules 7052, 9023, and 9024, which incorporate Federal Rules of Civil Procedure 52, 59, and 60, respectively. Debtor argues that this additional evidence could not have been, with reasonable diligence, available at the evidentiary hearing that took place on April 13, 2012. Debtor explains that "because of unforeseen and late developing circumstances" the authors of a January 2012 appraisal were not released to testify on Debtor's behalf. Debtor engaged a separate appraiser, John W. Wright, to conduct an update

to the January 2012 appraisal, but the report could not be completed in sufficient time to be submitted at the April 13 hearing. This updated appraisal will now be available, and Debtor contends that this new evidence will provide grounds for the Court to alter, amend, or provide Debtor with relief from the April 20, 2012 Order and reimpose the automatic stay.

The granting of a motion to alter or amend a judgment is an extraordinary remedy that should be used sparingly. In re Bell, 195 B.R. 818, 822 (Bankr. S.D. Ga. 1996) (Walker, J.); In re Harris, slip copy, 2005 WL 6742488 (Bankr. S.D. Ga. Mar. 21, 2005) (Davis, J.). A proper motion to alter or amend a judgment or motion for a new trial must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of newly discovered evidence; or (3) the need to correct clear error of law or prevent manifest injustice. *See* Estate of Pidcock v. Sunnyland Am., Inc., 726 F.Supp. 1322, 1333 (S.D. Ga. 1986) (Edenfield, J.). Such a motion cannot be used to relitigate old matters or present evidence that could have been raised prior to the entry of judgment. Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005). The burden lies with the moving party to show that reconsideration is appropriate. In re Bell, 195 B.R. at 821.

Debtor argues that the updated appraisal, which was incomplete as of the April 13 hearing, is "newly discovered evidence" sufficient to warrant the Court to amend its findings on valuation of the property and reconsider its Order granting relief from stay.

While the updated appraisal report and presumably the testimony that would accompany the report constitute new evidence in the sense that they were not presented at the time of trial, they do not rise to the level of "newly discovered evidence" sufficient to warrant reconsideration. To grant relief on the grounds of newly discovered evidence, the evidence must only have been discovered after judgment, despite earlier exercise of reasonable diligence. BAC Home Loans Servicing LP v. Grassi, slip copy, 2011 WL 6096509 (1st Cir. B.A.P. Nov. 21, 2011); In re Reading Broadcast, Inc., 386 B.R. 562 , 567 (Bankr. E.D. Pa. 2008). Further, newly discovered evidence must be of facts existing at the time of trial. In re W.M. Hall's Farm, Inc., 2010 WL 2836826 (Bankr. M.D. Ga. Jul. 16, 2010); *see also* Contempo Metal Furniture Co. of Cal. v. E. Tex. Motor Freight Lines, Inc., 661 F.2d 761, 766 (9th Cir. 1981). In W.M. Hall's Farm, Inc., the debtor filed a motion to extend time to postpone an auction of the debtor's property, arguing that funding would soon be available to pay the balance owed, as well as costs and expenses of the proposed auction. Due to certain internal miscommunications at the bank from which the debtor sought funding, the funding was delayed. The court denied the debtor's motion to extend because the debtor was unable to show that the loan had been approved. The auction took place and the court confirmed the sale. The debtor then received approval for the funding and filed a motion for reconsideration pursuant to Rule 9023. The court held that this approval of funding did not constitute "newly discovered evidence" because proof of the acquisition of loaned funds did not exist at the time of the entry of the order confirming the sale.

Like the debtor in W.M. Hall's Farm, Inc., the Debtor here now wishes to introduce evidence that was not in existence at the time of trial or at the time of the entry of this Court's Order. Although the property, which was the basis for the new appraisal report, was in existence at the time of the trial, the updated value was not. However, Debtor knew, indeed informed the Court, that an updated report was being prepared. There was no request to continue the hearing, nor to leave the record open in order to supplement the record with additional evidence. The parties rested, closed their case, and submitted the case for resolution with full knowledge that additional evidence was on the horizon, if not in hand. Debtor is now dissatisfied with the Court's ruling. In this context the evidence now proffered does not meet the standard. Debtor introduced its evidence of value at trial despite the possibility that evidence of a different value was prospectively available. Knowing that an updated report was imminent, reasonable diligence would require a showing, at the very least, that Debtor's counsel sought to delay the trial until the new report was available.

This is not to suggest any mishandling of the case by Debtor's counsel. There was no way to know if the updated appraisal would strengthen or weaken Debtor's case. Debtor's trial expert supported Debtor's position, and counsel made a sound legal decision to go forward, even if in hindsight the Court was largely persuaded by the movant's expert.

I hold that Debtor has not met its burden and the Motion to Amend must be denied. This result is not manifestly unjust. Debtor *was* able to present an appraisal of the Property, and *did* have an expert testify. While this particular appraisal and expert testimony may not, in retrospect, have been the most persuasive of the two opinions presented, Debtor did not request a continuance from the Court to have the new appraisal completed or to engage a different expert witness. A motion for rehearing or reconsideration is not intended to be used as a vehicle to introduce new evidence that could have been presented in conjunction with the original action. In re Gunter, 2007 WL 7136474 (Bankr. N.D. Ga. Jan. 16, 2007).

Despite the arguably technical nature of this rule, there are many practical and compelling reasons for it. A less-rigorous standard would open the possibility that parties would be encouraged to try cases with a certain body of evidence hoping for success, but holding out the possibility of later relitigating the issue by bringing in evidence that was still being developed on the trial date that might prove more favorable. Valuation evidence is particularly susceptible to change because of its opinion-based nature and constant market fluctuations. There is a potential that unscrupulous attorneys might be tempted to game the system. Here, I find no such possibility. Counsel for both parties are well-known to the Court, highly respected, and above reproach in their professionalism and integrity. But the Court's ruling must be guided by neutral, objective principles, not by a subjective assessment

of the motives of particular counsel. In keeping with that duty, it would be folly to establish a rule permitting evidence of this type in these circumstances.

Further, allowing consideration of this evidence on a motion to alter or amend hopelessly conflates the evidence by encouraging a party to advance more than one opinion on a value issue, contrary to my prior statements on this issue.[1] Assessing value is difficult enough a task and should not be made needlessly complex by allowing a party to simultaneously articulate different and therefore contradictory value opinions. Instead, it is ordinarily preferable to require a party to stake out a clear position on such a critical piece of evidence, and convince the Court to adopt it.

Making such tactical decisions are inherently part of the art of lawyering, and the restrictive rules governing newly discovered evidence are well-tailored to ensure thoughtful and solid lawyering, sound decision-making, articulation of a clear position in a contested setting, and finality.

---

[1] *See* In re Morgan Center, LLC, slip copy, 2011 WL 6130521 at note 1 (Bankr. S.D. Ga. Jul 26, 2011) (Davis, J.).

## ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Debtor's Motion for Amended or Additional Findings or, Alternatively, Motion to Alter, Amend, or Grant Relief from Order and Reimpose Automatic Stay is DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 16th day of May, 2012.